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No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is a criminal defendant deprived of due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that the jury may not consider evidence of the defendant's voluntary intoxication in determining the existence of a mental state which is an element of the criminal offense?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *State v. Egelhoff*, 900 P.2d 260 (Mont. 1995). (Pet. App. 1a-26a.)

JURISDICTION

The state court opinion was filed on July 6, 1995. (Pet. App. 1a-26a.) The petition for certiorari was filed on October 4, 1995 and certiorari was granted on December 8, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Mont. Code Ann. § 45-2-203 (1995):

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

Mont. Code Ann. § 45-5-102(1)(a) (1995):

> A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being . . .

Mont. Code Ann. § 45-2-101(34) (1995):

> "Knowingly" – a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Mont. Code Ann. § 45-2-101(63) (1995):

> "Purposely" – a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms, such as "purpose" and "with the purpose", have the same meaning.

STATEMENT OF THE CASE

Respondent James Allen Egelhoff was charged by information and convicted by a jury on two counts of deliberate homicide in violation of Mont. Code Ann. § 45-5-102 (1995) in the shooting deaths of Roberta Pavola and John Christianson. (J.A. 10-12.) To convict on a charge of deliberate homicide, under Montana law, the State must prove that the defendant "purposely" or "knowingly" caused the death of another human being. (Pet. App. 28a, 29a.) Egelhoff was sentenced to 40 years in the Montana State Prison and two years for the use of a firearm as to each count, to be served consecutively, for a total of 84 years' imprisonment. (J.A. 33-37.)

A. Testimony Presented at Trial

In July 1992, Egelhoff traveled to the Yaak area near Troy in Lincoln County, Montana, to pick mushrooms. While there, Egelhoff became acquainted with the victims, Roberta Pavola and John Christianson, who were also in the Yaak area to pick mushrooms. (Tr. at 644-47, 1109-10.) Egelhoff had with him only a blanket, a .38 caliber handgun, a holster in which he carried the gun, and a box of .38 caliber shells. (Tr. at 648-50, 1115-16, 1122, 1135-36.)

On Sunday, July 12, 1992, Egelhoff, Pavola and Christianson rode together in Christianson's old, blue, four-

door station wagon to sell the mushrooms they had picked the day before. (Tr. at 656-57.) They then bought a case of beer and, around noon that day, went to a party at the "Pink Apartments" in Troy. (Tr. at 569-60.) As they were heading into Troy, Egelhoff took the handgun and holster off his hip, handed it to Pavola and asked her to put it in the glove box. Pavola did as she was requested. (Tr. at 669, 1123.) The trio spent most of the day drinking at the party and in bars. (Tr. at 660-61, 1127.)

Pavola, Christianson and Egelhoff left the party shortly after dusk on July 12 and drove away in Christianson's station wagon. (Tr. at 669, 1137-38.) Christianson was driving, Pavola was on the front passenger side and Egelhoff was behind Pavola. (Tr. at 673.)

Egelhoff and Christianson were later seen at about 9:20 p.m. when they bought beer and cigarettes. While Christianson appeared to have been drinking, Egelhoff did not seem intoxicated. He spoke well and did not slur his words. (Tr. at 975-77, 982.)

Later that evening Christianson's station wagon was seen being driven very erratically on old Highway 2 in the area of the KOA Campground. The car veered off the left side of the road into a ditch and stopped. (Tr. at 906.) A motorist stopped on the right side of the road, exited his car, crossed the highway and approached the station wagon. (Tr. at 906-07.) At a distance of less than 20 feet, he saw three people in the car: a driver, a passenger in the front seat and a person in the back seat positioned between the two people in the front seat. (Tr. at 907-09.) He thought the person in the front passenger side was probably injured because he or she did not move and did

not make any noise. (Tr. at 909-10.) The person in the back seat, who was male, was shouting obscenities. He told the witness that no one was hurt and to "get the hell out of there." (Tr. at 910-11.) Christianson's vehicle immediately began to move forcefully forward and backward several times, crashing into the brush and a tree in an attempt to turn the automobile around and get it out of the ditch. The motor was then gunned. The witness testified that he was "scared to death" and decided quickly to leave the area for his own safety. (Tr. at 911-13.)

Another witness testified that he drove on old Highway 2 near the KOA Campground on July 12 and 13. He did not notice anything on that road on July 12, but on the morning of July 13, he saw small square chunks of glass in the middle of the road that appeared to have come from a car window. (Tr. at 570-72.)

At approximately midnight on July 13, another witness was driving on new Highway 2 when she noticed a damaged guardrail and debris lying on the road and a slow-moving blue station wagon that looked as though it had crashed into the guardrail. The witness exited her car and tried to flag down the station wagon. The station wagon, however, revved its engine, went into the other lane and around the witness and then entered the ditch on the right side of the road. The station wagon's engine then raced and the car rocked back and forth, trying unsuccessfully to exit the ditch. (Tr. at 282-83, 285, 287-88, 290-92, 300.)

The witness approached the station wagon and called out to its occupants. Egelhoff was sitting in the back of the car and responded by shouting something about his

hands. The witness looked inside the car and saw a man in the back and someone in the front seat, near the center of the seat but slumped toward the passenger's side. She asked the man in the back if he was okay and he responded with a profane expression indicating that he was not alright. Egelhoff did, however, respond to the questions the motorist asked him. The witness attempted to open the driver's side door but was required first to remove a big stick which was protruding out of the window and unlock the door. The witness testified that she thought that the big stick had been used from the back seat to press the gas pedal when the car was attempting to exit the ditch. (Tr. at 301-05, 315, 335, 337-40, 424, 426.)

An ambulance attendant found Egelhoff in the back of the car lying on his right side with his head toward the rear end of the car. When she rolled Egelhoff over to place him on the backboard, she noticed that he was wearing a holster on the back center part of his belt. (Tr. at 520-21, 525, 528.) As the ambulance left, Egelhoff kept yelling and trying to sit up. He suddenly became very profane and screamed that he wanted to get out. He became very violent and hit two ambulance attendants. Egelhoff then told one of the ambulance attendants that he was going to kill him. (Tr. at 478-79, 483-87.) The ambulance attendant testified that Egelhoff was the most violent person with whom he had ever dealt. (Tr. at 488-89, 492, 507.)

Egelhoff was taken to a hospital. A sheriff's department detective arrived at the hospital at approximately 1 a.m. on July 13 and observed Egelhoff there for approximately five or six hours. Egelhoff was very strong and

combative throughout the entire time the detective was at the hospital. At one point, he observed another detective attempt to take a photograph of Egelhoff while Egelhoff was on his back. Egelhoff looked directly at the detective and, with apparent planning and extreme accuracy, pulled back his leg and hit the camera exactly with the flat of his foot, knocking the camera to the floor. The detective who had attempted to take the photograph thought Egelhoff's coordination was quite good and was surprised to learn that Egelhoff's blood alcohol level was .36. (Tr. at 701, 839, 849.)

A search of the blue station wagon revealed Egelhoff's tennis shoe underneath the steering wheel on the floorboard. Egelhoff's revolver was found on the floorboard of the station wagon near the brake pedal on the driver's side. (Tr. at 558.) The revolver contained four live rounds and two empty casings. One empty casing was found directly under the firing pin in line with the barrel, and the other empty casing was found to the right of the barrel. When Egelhoff's gun was cocked, the cylinder turned clockwise. This was consistent with the way the bullets and empty casings were situated in Egelhoff's gun if they had been shot in sequence. (Tr. at 608-10.)

Atomic absorption swabs were taken from Egelhoff's hands to determine if there were any chemicals or powders on his hands which would indicate that he had fired a gun. Test results were consistent with Egelhoff shooting a gun holding it in his left hand or in both hands. (Tr. at 386-88, 390, 409.) A firearm expert testified that bullet fragments removed from Christianson could have come from Egelhoff's gun (Tr. at 93, 95-96), but bullet fragments

removed from Pavola were too small to identify as coming from any particular weapon. (Tr. at 102.)

The medical examiner determined that Pavola and Christianson each died from one gunshot wound to the head. Pavola had been shot in the left temple area and the bullet, which was never found, exited on the right side of the back of Pavola's head. Skull fragments were missing from the area of the exit wound. (Tr. at 155-57, 160, 163, 165.) Christianson was shot in the right back side of his head. (Tr. at 169.)

The medical examiner examined three bone fragments which had been found with a large amount of shattered glass in the middle of the road on old Highway 2. He determined that they were skull fragments and that all three fragments contained material that appeared to be lead. (Tr. at 179-81.) In the medical examiner's opinion, neither of the victims' gunshot wounds was consistent with suicide. (Tr. at 182.) Blood stains found on Egelhoff's pants and T-shirt were consistent with Christianson's and Pavola's blood. (Tr. at 240-41, 245-47, 248-50, 845.) The prosecution's evidence at trial was thus overwhelming that Egelhoff had murdered Christianson and Pavola.

B. Defense Testimony at Trial

Egelhoff testified that he did not remember much of what occurred on the evening of July 12, 1992. His last clear memory on that date was his presence at the Pink Apartments when there was still daylight. He stated he did not remember leaving the apartments, being in the station wagon, shooting the gun, or kicking the detective

with the camera. The only memory he had after leaving the party was that the station wagon was parked somewhere and he and Christianson were sitting outdoors, passing the bottle of "Black Velvet" back and forth. (Tr. at 1127-30, 1132, 1136-38.) Egelhoff presented evidence regarding his intoxication and contended that his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides. As such, he asserted that an unidentified fourth person must have committed the crimes. He also claimed he suffered from an alcoholic blackout which prevented him from recalling the events of the night in question. All evidence of Egelhoff's intoxication was admitted on the issues of physical incapacity and lack of memory. Egelhoff did not contend he lacked the requisite intent to commit the murders; his defense was that he had not committed the crimes.

C. Jury Instructions

The district court instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (1995) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

(Jury Instr. No. 11; Pet. App. 29a.) Thus, the voluntary intoxication evidence was admissible, as offered by

Egelhoff, to show Egelhoff's physical inability to commit the crimes and to explain why he could not provide any details concerning his alleged "fourth person" defense. However, pursuant to § 45-2-203, the evidence could not be considered by the jury as to whether he "knowingly" or "purposely" committed the alleged crimes.

The district court instructed the jury that the State retained the burden of proof, beyond a reasonable doubt, as to all the elements of the offenses, including the mental state requirement of having acted knowingly or purposely. (Pet. App. 30a.) The district court further instructed the jury that the State has the burden of proving guilt of the defendant beyond a reasonable doubt and that the defendant is presumed to be innocent of the charges against him. The jury was told that this presumption is not overcome unless, from all the evidence in the case, the jury is convinced beyond a reasonable doubt that the defendant is guilty. The jury additionally was told that the instructions were to be read as a whole, and that the defendant is not required to prove his innocence. (Pet. App. 27a-28a; J.A. 13-14.)

Egelhoff objected to the intoxication instruction on federal constitutional grounds, arguing that § 45-2-203 was unconstitutional because it shifted the burden from the State to him with respect to the required mens rea by lowering the required mental state for those who are voluntarily intoxicated. (Tr. 1158-59, J.A. 38-39.) Egelhoff repeated the argument in his posttrial motion for a new trial. (J.A. 15-19.)

D. The Decision of the Montana Supreme Court

Egelhoff appealed his conviction to the Montana Supreme Court, claiming that § 45-2-203 is unconstitutional because it has the effect of negating the requirement that the State prove that the defendant acted knowingly or purposely which is an element of deliberate homicide. Relying upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution and this Court's decisions interpreting that provision, the Montana Supreme Court declared § 45-2-203 unconstitutional and reversed the convictions. In doing so, the Montana Supreme Court stated that since the jury was not allowed to consider evidence of voluntary intoxication on the element of Egelhoff's mental state, the State's burden of proof beyond a reasonable doubt on that element was reduced, in violation of the Court's ruling in *In re Winship*, 397 U.S. 358, 364 (1970). (Pet. App. 10a, 12a, 14a.) The Montana court cited *Chambers v. Mississippi*, 410 U.S. 284 (1973), in stating that, due to § 45-2-203, Egelhoff was denied the right to a fair opportunity to defend against the State's accusations (Pet. App. 12a). The state court also relied upon *Martin v. Ohio*, 480 U.S. 228 (1987), for the proposition that a court may not constitutionally disallow admission of evidence of voluntary intoxication during trial and may not prevent consideration of that evidence by the jury in determining whether Egelhoff possessed the requisite knowledge or purpose. (Pet. App. 12a-14a.)

SUMMARY OF ARGUMENT

There is no problem concerning the criminal laws that vexes policymakers more than the proper method of dealing with the use of alcohol or drugs in connection with the commission of a crime. It is well documented that an enormous number of crimes are committed by individuals under the influence of some judgment-impairing substance. The problem posed by alcohol in particular is its widespread use by individuals who may have no proclivity to commit crimes when sober, but act lawlessly when they are in an alcohol-impaired condition. The issue posed in this case is whether the Montana legislature's particular solution to this unquestioned problem comports with the Due Process Clause of the Fourteenth Amendment.

In 1987 the Montana legislature responded to these changing attitudes and values by amending Mont. Code Ann. § 45-2-203 (1995) to limit more stringently the use of intoxication as grounds for exculpation from criminal liability. As amended, the statute not only precludes use of intoxication as an affirmative defense to criminal liability but also assigns no exculpatory value to voluntary intoxication for purposes of determining whether any required mental state is present. The law, however, does not preclude consideration of intoxication for other purposes to the extent material to assessing criminal liability, including whether a defendant was incapable of performing the conduct with which he is charged. That § 45-2-203 reflects a commonsense approach to the problem of intoxicated defendants is not in question; that it is a constitutionally acceptable approach is reflected both in the refusal of common law courts to allow intoxication to

serve exculpatory ends and by this Court's decisions recognizing the broad discretion possessed by States to determine the circumstances under which conduct will give rise to criminal liability.

At common law, a voluntarily intoxicated person was not permitted to take advantage of his or her condition as a basis for escaping criminal responsibility. This common law practice has been modified in many States over the course of time, but the vast majority of States still restrict in some fashion the ability of defendants to avoid criminal responsibility on the grounds of intoxication. Montana and at least nine other States, moreover, follow the common law rule vigorously by precluding a defendant from reliance on voluntary intoxication not merely as an affirmative defense but also to negate the existence of any mental state required for conviction. This Court has recognized that common law traditions have substantial relevance in determining the scope of the Due Process Clause of the Fourteenth Amendment. Substantive criminal laws consistent with those traditions rarely, if ever, can offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977). Montana's refusal to permit a defendant to hide behind voluntary intoxication to avoid criminal responsibility for deliberate homicide clearly does not infringe any principle this Court could describe fairly as "fundamental."

Finally, § 45-2-203 does not exceed any of the due process bounds established by the Court. Montana's statute does not create a presumption of guilt, does not shift the burden of proof on any element of the crime, and

does not deny a defendant the opportunity to show he is actually innocent of the crime charged. For purposes relevant here, § 45-2-203 only bars a defendant from escaping criminal responsibility, to the extent mental state is dispositive, simply because he was voluntarily intoxicated. As such, it falls squarely within the range of state authority the Court repeatedly has held to be unencumbered by federal due process constraints.

ARGUMENT

A. Section 45-2-203 Establishes a Generally Applicable Standard of Criminal Liability for Intoxicated Persons Under Which No Exculpatory Value May Be Assigned to Voluntary Intoxication for Purposes of Determining Mental State and Is Supported by Important Policy Considerations.

1. In Montana's 1973 criminal law recodification, the state legislature adopted a criminal responsibility statute providing that

> [a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him or [sic] his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

1973 Mont. Laws ch. 513, § 1. The statute was substantively unmodified until 1987 when the current law was enacted. 1987 Mont. Laws ch. 251, § 1 (codified at Mont. Code Ann. § 45-2-203 (1995)). The current statute reads:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

While, as the concurring opinions of Chief Justice Turnage and Justice Nelson indicate (Pet. App. 21a, 22a), the principal change between the provisions was elimination of a defendant's right to offer evidence of intoxication to negative the prosecution's mental state proof, a somewhat more detailed analysis of § 45-2-203 is necessary to frame the due process issue involved here.

The intoxication statute consists of four separate but related parts. The first is the opening clause which makes a defendant "criminally responsible" for his conduct. The Montana Supreme Court definitively interpreted this clause in *Kills On Top v. State*, 901 P.2d 1368 (Mont. 1995). It rejected there a claim that the first clause "mandates that a jury find a defendant guilty of the charged crime if the jury finds that the defendant was intoxicated" because, "[e]ven if the jury found that [the defendant] was intoxicated, under the instructions as a whole, the State still had to prove each of the elements of the crime

in order to establish criminal responsibility." *Id.* at 1380; *see also State v. Byers*, 861 P.2d 860, 875 (Mont. 1993), *overruled in part, State v. Egelhoff*, 900 P.2d at 267 (rejecting contention that intoxication instruction "relieved the State of the burden of proving beyond a reasonable doubt all of the elements of the offense"). The first clause accordingly represents a general statement of legislative intent to remove intoxication as a ground for negativing a defendant's criminal responsibility.

The second and third parts of the provision specify, respectively, that intoxication is not a "defense" to any crime and that it may not be considered in determining whether the requisite mental state exists. The term "defense" in § 45-2-203 has not been construed by the Montana Supreme Court, but it plainly refers to use of intoxication as an affirmative defense – i.e., to exculpate a defendant notwithstanding proof of the involved crime's elements beyond a reasonable doubt. *See Kills On Top*, 901 P.2d at 1380 (an instruction embodying § 45-2-203 "merely advised the jury that intoxication does not excuse otherwise criminal conduct"). The third part reflects the substantive amendment made in 1987 and eliminates intoxication as a basis for negativing the existence of mens rea. However, the provision does not preclude consideration of intoxication for other purposes to the extent material to a determination of criminal liability, such as showing that a defendant was incapable of performing the conduct with which he was charged. The fourth part, finally, is a proviso dealing with involuntary intoxication, an issue not involved here.

In sum, § 45-2-203 eliminates voluntary intoxication as an affirmative defense for criminal conduct under any

circumstances and removes voluntary intoxication as a basis for negativing the State's proof of the mental state element in a crime. It is thus a substantive rule of law governing the determination of criminal responsibility and in this case barred Egelhoff from escaping criminal liability, to the extent his mental state at the time of the deliberate homicides was at issue, merely because he was voluntarily intoxicated.

2. Voluntary intoxication, as it pertains to criminal responsibility, implicates profound matters of public policy concern. The Montana legislature's restriction on voluntary intoxication evidence simply prevented voluntarily intoxicated defendants like Egelhoff from relying upon the fact of their intoxication to negate mental state and effectively imposed the same standard of criminal culpability on them as on a comparably-situated sober actor by removing intoxication as a factor to be considered by the fact finder. A determination, like that reached by the Montana court, invalidating this legislative assessment of culpability, ignores the critical fact that the defendant voluntarily caused his own intoxication and should not be permitted to benefit from a condition he alone created.

The Montana court's conclusion also ignores the serious harm that a tolerant attitude regarding voluntary intoxication may generate. Alcohol abuse is involved in many serious crimes, particularly crimes of violence. Approximately one-half of all homicide perpetrators are under the influence of alcohol at the time of the incident. Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981); *see also Intoxication As a Criminal Defense*, 55 Colum. L. Rev. 1210 (1955). Just as New York was

unwilling, for valid policy reasons, to require the prosecution to establish the absence of extreme emotional disturbance beyond a reasonable doubt (*Patterson*, 432 U.S. at 207), Montana is unwilling to allow those who commit serious crimes to benefit from a voluntarily assumed condition. Contained in § 45-2-203 is a public policy assessment that the inherent risk of impaired judgment associated with intoxication is readily apparent to those who choose to become intoxicated. In addition, the societal consequences from intoxication are so detrimental that, as to the existence of a required mental state, the intoxicated person should be denied any exculpatory excuse based on the mere fact of voluntary intoxication.

A State accordingly has very significant policy grounds for determining that the act of voluntary intoxication carries with it sufficiently blameworthy consequences to warrant its exclusion from consideration as to mental state. Allowing a defendant to exculpate his conduct by means of a self-induced condition flies in the face of the principle of personal accountability forming the foundation of all law. Moreover, because that condition ordinarily, if not always, is within the control of the defendant and because of its high correlation to criminal activity, voluntary intoxication requires, and has received, unique judicial and legislative treatment.[1] Section 45-2-203 falls squarely within this long tradition by

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[1] Egelhoff has never contended his alcohol consumption was involuntary or, for that matter, the result of some addiction beyond his control. Whether the latter circumstance would ever make a constitutional difference thus need not be considered. *Cf. Powell v. Texas*, 392 U.S. 514 (1967).

depriving a voluntarily intoxicated person of the ability to negative the intent element of a crime on the basis of his intoxication – i.e., by depriving him of the ability to use one form of culpable conduct to eliminate responsibility for another.

B. The Montana Statute Is Fully Consistent With Common Law Rules Extant at the Time the Constitution Was Adopted.

In defining the Due Process Clause's substantive limits on criminal law, the Court often has looked to the common law and the practice of various jurisdictions, *see, e.g., Schad v. Arizona*, 501 U.S. 624, 640-43 (1991). At common law, voluntary intoxication was not a defense in a criminal prosecution. *Hopt v. People*, 104 U.S. 631, 633 (1881) ("At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence"); Benton et al., *Special Project: Drugs*, 33 Vand. L. Rev. 1145, 1172 (1980); Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-47 (1944). Indeed, historically, there is some support for the proposition that if an actor was drunk, the crime was to be punished more severely. Blackstone states, "[O]ur law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior." 4 W. Blackstone, *Commentaries on the Law of England*, at 25-26 (1769). *See also* Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1 & n.4.

At "old common law," the courts would not allow a defendant who became voluntarily intoxicated to urge his infirmity as a defense to a specific intent crime. His intent

was presumed as long as he acted as if he had the requisite intent. Murphy, *Has Pennsylvania Found a Satisfactory Intoxication Defense?*, 81 Dick. L. Rev. 199, 206 (1977). Early common law also made no concession whatever because of intoxication, however gross,[2] even though homicides committed by insane persons were treated with some lenience. The earliest report is dated 1551 and approves the death sentence for a homicide committed by a defendant in extreme intoxication. *Reniger v. Fogossa*, 1 Plowden 1, 75 Eng. Rep. 1 (K.B. 1551). From that time to approximately the mid-nineteenth century, this rigorous rule prevailed. The reasons advanced in support of the rule that voluntary intoxication is no defense include the ease of counterfeiting the disability,[3] the belief that there could rarely be a conviction for homicide if drunkenness avoided responsibility,[4] and the fact that homicide and many other crimes frequently involve intoxication and, apparently by sheer force of numbers, it would not be wise to relax the rule. The commonly accepted view was that "such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." 1 Hale, *Pleas of the Crown* at 32. Justice Story, while riding the Circuit, stressed the merit of "the

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[2] *See* Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 Law Q. Rev. 528, 530 (1933).

[3] 1 Hale, *History of the Pleas of the Crown*, at 32 (1736) ("Now touching the trial of this incapacity . . . this is a matter of great difficulty, partly from the easiness of counterfeiting the disability . . . and partly from the variety of the degrees of this infirmity").

[4] 1 Wharton, *Criminal Law* § 66, at 95 (1932).

law allowing not a man to avail himself of the excuse of his own gross vice and misconduct to shield himself from the legal consequences of such crime." *United States v. Drew*, 25 F. Cas. 913 (C.C.D. Mass. 1828) (No. 14,993); *see also Pearson's Case*, 2 Lew. C.C. 144, 168 Eng. Rep. 1108 (N.P. 1835) (voluntary drunkenness is no excuse). *See* Benton, 33 Vand. L. Rev. at 1172; Hall, 57 Harv. L. Rev. at 1046-47.

In the late nineteenth century, as part of an effort to mitigate the stringent but reasonable common law rule, the courts crafted a new rule allowing evidence of voluntary intoxication to negate the required mental state in "specific intent" crimes, but making the evidence inadmissible for "general intent" crimes.[5] *See, e.g., Regina v. Doherty*, 16 Cox Cr. C. 306, 308 (N.P. 1887) ("[A]lthough you cannot take the drunkenness as any excuse for crime, yet when such crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime"); *see also Commonwealth v. Rumsey*, 454 A.2d 1121, 1123 (Pa. Super. Ct. 1983); Benton, 33 Vand. L. Rev. at 1172; Hall, 57 Harv. L. Rev. at 1046-49.

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[5] Since Montana revamped its criminal statutes in 1973, borrowing concepts of mens rea from the Model Penal Code, specific intent need not be shown unless the statute defining the offense requires a specific purpose as an element thereof. *State v. Starr*, 664 P.2d 893, 897 (Mont. 1983). Deliberate homicide, the offense with which Egelhoff was charged and convicted, is not one of these "dual intent" crimes. Obviously, complete exculpation in this situation is at odds with the common law doctrine that voluntary intoxication is no excuse.

As the courts struggled with determining whether a particular crime was one involving "specific" or "general" intent, it became apparent that the dividing line was based not so much on an inquiry of what subjective state of mind was required for each offense, but rather on matters of policy concerning what criminal responsibility should be borne by intoxicated offenders. *People v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *People v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969). Generally, those crimes defined as requiring specific intent were those in which negation due to intoxication would not result in total acquittal, but would only lead to the offender's responsibility being lowered to a lesser crime. The specific intent-general intent dichotomy was severely criticized as creating artificial distinctions between criminal intents, as being elusive in definitions, and as leading to inconsistent results. *See, e.g.*, Hall, 57 Harv. L. Rev. at 1064; *Alcohol Abuse*, 94 Harv. L. Rev. at 1684.

This Court has recognized that common law traditions have substantial relevance in determining the scope of the Due Process Clause in the Fifth and Fourteenth Amendments "because the criminal process is grounded in centuries of common-law practice." *Medina v. California*, 112 S. Ct. 2572, 2577 (1992); *accord Schad*, 501 U.S. at 640-41; *Patterson*, 432 U.S. at 202; *see also Godinez v. Moran*, 113 S. Ct. 2680, 2689-91 (1993) (Kennedy, J., concurring). State criminal procedural or substantive practices consistent with those traditions thus offer little assistance to a claim, such as the one here, that such practices "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

Patterson, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)); *see also Schad*, 501 U.S. at 633.

The decision of the Montana legislature, and the state legislatures of at least nine other States, to preclude a defendant from relying on his voluntary intoxication to negate the existence of the required mental state clearly falls within the common law tradition. Because no doubt exists that a legislature acting at the time of the Constitution's adoption would have been free to adopt the precise restriction challenged here, Egelhoff has an unusually heavy burden to show that the operation of § 45-2-203 in his prosecution violated the Due Process Clause.

C. The Court Has Recognized Repeatedly the Constitutionally Unrestricted Prerogative of States to Determine the Nature and Scope of Criminally Culpable Conduct.

The Court has been extremely reluctant to construe the Constitution to intrude upon the administration of justice by the individual States because preventing and dealing with crime is much more the States' responsibility than the federal judiciary's. A State's policy judgments in this sensitive area will not be second-guessed under the due process standards unless those judgments offend "the very essence of a scheme of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). *See Schad*, 501 U.S. at 633.

The vast majority of States limit the use of voluntary intoxication evidence. *See* 1 Paul H. Robinson, *Criminal Law Defenses* § 65(a), 289-93 (1984); *id.* at 43-45 (1995 Supp.). If a State constitutionally can limit the application

of voluntary intoxication as an affirmative defense, it is logical to conclude that a State can take the next step and preclude a defendant from relying on voluntary intoxication to negate the existence of the required mental state so long as it retains its ultimate burden to establish the required mens rea beyond a reasonable doubt. Montana and at least nine other states have adopted the latter course.

The fundamental issue here is whether this intuitively appropriate result is somehow inconsistent with basic notions of due process. An analysis of the treatment of intoxication at common law – often the starting point for identifying core due process rights – has established that voluntarily intoxicated persons were not permitted to take advantage of that condition to escape criminal liability. Complementing this common law tradition is the Court's settled recognition that States have broad authority to define crimes as they see fit, and with that authority comes the power to determine what shall, or shall not, exculpate a person from those crimes.

1. The Court has found the States constitutionally prohibited from creating presumptions of guilt (*McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916)) and from shifting the burden of proof on the elements of any crime (*Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. at 358). The Court nevertheless has been quite hesitant to impose constitutionally derived restrictions on the types of criminal laws state legislatures may pass. It thus has allowed the States, which have always been primarily responsible for the prevention and prosecution of crime, great latitude in defining the elements of and defenses to

crimes. A review of those decisions finding a due process limitation on the States' authority reflects the narrow reach of the Fourteenth Amendment in this field.

In *McFarland*, 241 U.S. at 86, the Court stated that the legislature's power to raise presumptions and change the burden of proof is expansive but not limitless. There must be a rational connection between the fact proved and the ultimate fact presumed. The Court declared that the legislature exceeded its power in that case when it enacted a statute which declared an individual presumptively guilty of a crime. *See also Tot v. United States*, 319 U.S. 463, 469 (1943) (the legislature has no power to command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all facts essential to guilt).

In *Mullaney*, 421 U.S. at 684, the charge was murder, which the Maine statute defined as the unlawful killing of a human being "with malice aforethought either express or implied." The trial court instructed the jury that the words "malice aforethought" were vital because "malice aforethought is an essential and indispensable element of the crime of murder." Under the statute, malice was to be implied from "any deliberate, cruel act committed by one person against another suddenly . . . or without a considerable provocation." An intentional killing consequently was murder unless the defendant could show by a preponderance of evidence that the act was committed "in the heat of passion, on sudden provocation." *Id.* at 686-87. The Court stated that this shifting of the burden onto the defendant to negate the element of "malice aforethought," a fact which the State deemed so fundamental that it must either be proved or presumed,

was beyond the State's powers under the Due Process Clause.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the defendant was charged under a Montana statute with deliberate homicide in that he "knowingly" or "purposely" caused the victim's death. The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" over the defendant's objection that the instruction had the effect of shifting the burden of proof on the issue of knowledge or purpose. The Court held that the instruction violated the Due Process Clause because it impermissibly shifted to the defendant the burden of disproving an element of the crime charged, i.e., purposely or knowingly. *Id.* at 512.

In *In re Winship*, 397 U.S. 358, 360 (1970), the Court was presented with the "single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." The Court there "constitutionalized" the reasonable doubt standard, stating that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

These cases, which set forth certain procedural limitations on the State's authority under the Due Process Clause, are not applicable to the instant case. This case involves a substantive legislative determination of standards for imposing criminal responsibility.

2. Far more relevant here is the line of cases including *Patterson*, 432 U.S. at 197, and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where the Court has demonstrated its reluctance to restrict under due process principles the authority of States to formulate substantive criminal law. Determinations about what facts are necessary to constitute the crime instead "represent value choices more appropriately made in the first instance by a legislature rather than by a court" acting under the most general of guidance provided by the Due Process Clause in the Fourteenth Amendment. *Schad*, 501 U.S. at 637. Implicit in the States' right to define the elements of a particular crime is the right to determine what defenses to that crime they will recognize and, by parity of reasoning, whether certain forms of voluntary conduct shall be deemed exculpatory with respect to negativing elements of a crime.

In *Patterson*, this Court held that due process requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense with which the defendant is charged. The Court stressed that, in determining what facts must be proved beyond a reasonable doubt, the State legislature's definition of the elements of the offense usually is dispositive. The Court stated that the application of the reasonable doubt standard has always been dependent on how a State defines the offense (432 U.S. at 214 n.12) and that *Mullaney*, 421 U.S. at 684, did not require the prosecution to prove beyond a reasonable doubt every factor or consideration affecting the degree of criminal culpability which is not

specifically included as an element of the offense. *Patterson*, 432 U.S. at 214.[6]

In *McMillan*, the Court upheld a state statute that imposed a mandatory minimum sentence of five years for visible possession of a firearm during the commission of certain enumerated felonies. The State was not required to charge and prove the fact of possession at trial. Rather, the statute specified that the issue would be reserved for sentencing, to be resolved by the judge by a preponderance of evidence. 477 U.S. at 91. The defendants challenged the constitutionality of the Pennsylvania law under the due process rules of *In re Winship*, 397 U.S. 358 (1970), arguing that possession of a weapon was a fact that had to be treated as an element of the offenses with

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[6] In *Patterson*, the defendant was convicted of second degree murder after the State proved beyond a reasonable doubt that the defendant had caused the death of another person and that he had intended that death. The conviction would have been reduced to manslaughter if Patterson had persuaded the jury that he had "acted under the influence of extreme emotional disturbance," a burden he bore under New York law. Patterson challenged, on due process grounds, the allocation of the burden of proof on this mitigating factor. The Court approved placing the burden of proof on the defendant and affirmed the conviction, stating that under state law, "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." 432 U.S. at 205-06. Thus, the Court found that the State may define the offense of murder without reference to the defendant's "heat of passion" at the time of the offense and, because the State proved beyond a reasonable doubt the elements in the definition of the offense, due process was satisfied.

which they had been charged. If this were so, the State would be required to prove the relevant facts at trial beyond a reasonable doubt, and the issue could not be delayed until sentencing, where it could be resolved under a lower standard of proof and in the absence of other trial-type protections. In rejecting the claim, the Court stressed its traditional deference to state legislative judgments in matters of criminal justice and restated that, in determining what facts must be proved beyond a reasonable doubt, the State legislature's definition of the elements of the offense is usually dispositive. 477 U.S. at 85.

The Court has accorded broad discretion to the States to define its substantive criminal law because it recognizes that preventing and dealing with crime is a preeminent role of the States. *Patterson*, 432 U.S. at 201; *McMillan*, 477 U.S. at 85; *see also Schad*, 501 U.S. at 638; *Martin v. Ohio*, 477 U.S. at 232. As Justice Black observed in his concurrence in *Powell*, 392 U.S. at 545:

> The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E.g., United States v. Dotterweich*, 320 U.S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals.

The Court thus has recognized that, traditionally, due process requires that only the most basic procedural safeguards be observed. More subtle balancing of society's interests against those of the accused has been left to the States' legislative branches. *Patterson*, 432 U.S. at 210.

The Court also has recognized repeatedly that one of the States' greatest rights under federalism is the dynamic ability to define criminal standards in accord with the beliefs of its citizens. Perhaps in no other area of law does society express its accepted norms or standards more directly than in determining what constitutes criminal behavior. The changing views of criminal responsibility will be reflected by a state legislature as it decides whether to recognize certain defenses, the limitations to place on defenses and, as in this case, the criminal responsibility of the voluntarily intoxicated actor.

3. Contrary to the Montana court's decision, neither *Martin v. Ohio*, 480 U.S. 228 (1987), nor *Chambers v. Mississippi*, 410 U.S. 284 (1973), compels the conclusion that the intoxication instruction in this case impermissibly reduced the State's burden of proof with respect to the mens rea element of the crimes with which Egelhoff was charged. In *Martin*, Ohio defined aggravated murder as "purposely causing the death of another with prior calculation or design" and required the defendant to prove self-defense by a preponderance of the evidence. Martin argued that this scheme violated due process because a purposeful killing could still be lawful if done in self-defense, yet the defendant bore the burden of proof as to that defense. The Court upheld placing upon Martin the burden of proof for self-defense because the prosecution still was obligated to prove all the express elements of murder, as defined by the state law, beyond a reasonable doubt. 480 U.S. at 232. Under *Martin*, therefore, the State is free to define the offense of murder without including the absence of self-defense as an element.

The *Martin* dissent expressed concern that, since evidence of self-defense may bear on a finding of prior calculation and design, instructing the jury that the defendant bears the burden of proof on self-defense created an inconsistency with the instruction that the State must prove mens rea beyond a reasonable doubt. 480 U.S. at 237-42 (Powell, J., dissenting). The majority, however, believed that the instructions adequately directed the jury to consider self-defense evidence in deciding if the State met its burden of proving prior calculation and design, whether or not the evidence was sufficient to establish the affirmative defense of self-defense. *Id.* at 233-34. Relying on the majority's observation in *Martin*, the Montana Supreme Court incorrectly held that the State was unconstitutionally relieved of part of its burden to prove mental state when the jury was instructed that it could not consider Egelhoff's voluntary intoxication in determining whether he acted knowingly or purposely. (Pet. App. 12a-14a.) *Martin* is readily distinguishable from this matter.

First, the Court noted that under Ohio law, evidence that a killing was done in self-defense could "justify the killing" and "show [the defendant] to be blameless" without reference to whether such evidence established an affirmative defense. 480 U.S. at 233. In other words, denying the defendant the opportunity to present evidence that he acted in self-defense would create the serious risk of convicting a blameless person under the standards of culpability expressly adopted by the Ohio legislature. Here, in contrast, the Montana legislature has not determined that the fact a defendant is intoxicated when he commits an offense renders the intoxicated offender

blameless; indeed, in large measure the legislature has reached exactly the opposite conclusion. Unlike the situation with self-defense, a defendant in Montana who is prevented from presenting evidence of his voluntary intoxication on the issue of his mental state cannot complain that the State created the peril of convicting an actually "innocent" person since, by operation of state substantive criminal liability principles, voluntary intoxication cannot serve to establish nonculpable intent.

Second, Ohio recognized the defense of self-defense. One can argue that when a State provides a defense capable of totally or partially exonerating a defendant, it evinces recognition that the exculpatory factor significantly and legitimately affects criminal responsibility. In contrast, the Montana legislature has chosen to exclude voluntary intoxication as an exculpatory factor by expressly providing that the fact that a defendant is voluntarily intoxicated does not affect his criminal responsibility. Since States are not constitutionally required to allow such defenses (*see United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980)), it thus follows logically that States are not constitutionally required to permit defendants to introduce evidence of such conditions to defeat a substantive element of a crime. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (in a trial for murder in the first degree, which made deliberation and premeditation essential elements of the crime, the court did not err by refusing to instruct the jury that they should consider evidence of the defendant's mental deficiency, not amounting to legal insanity, to determine whether he was guilty).

This case is also unlike *Chambers*, where Mississippi's evidentiary rules precluded the defendant from presenting an actual innocence defense otherwise recognized under state law as exculpatory. Montana's challenged instruction did not preclude consideration of voluntary intoxication for the purpose of negating the conclusion that Egelhoff inflicted the fatal blows, and it did not prevent Egelhoff from using voluntary intoxication to support his "fourth-person" defense. Stated otherwise, the instruction did not preclude Egelhoff from using the fact of intoxication to establish his actual innocence – i.e., that he did not or could not perform the physical act with which he was charged because of his intoxicated condition. It did preclude him, however, from using voluntary intoxication to negate the prosecution's showing that the homicides were carried out by him knowingly or purposely because the legislature has determined that no exculpatory value should be assigned to that condition to the extent it may affect a person's mental state.[7]

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[7] The fact the voluntary intoxication is not exculpatory with respect to an offense's mental state requirement also distinguishes this matter from cases where "an evidentiary ruling deprived [a defendant] of his fundamental right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). Those decisions have involved state procedural practices or statutes which interposed an arbitrary barrier to a defendant's ability to present otherwise admittedly exculpatory evidence. *Crane*, 476 U.S. at 689 (state procedure which prohibited evidence at trial concerning voluntariness of confession when that issue had been resolved in suppression hearing impaired due process rights since, "regardless of whether the defendant marshalled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall

4. This Court, in short, has never imposed its views on the States as to the mens rea required for a particular offense. It intentionally has refrained from doing so because the doctrine of mens rea has "historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell*, 392 U.S. at 536. On the basis of general deterrence objectives, a State therefore may, when the offender stands in a position of responsibility for the resulting events and the ensuing harm is great, impose criminal responsibility without demonstrating ***any*** culpable mental state of the actor toward the harm. *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281, 285 (1943); *see also United States v. Freed*, 401 U.S. 601, 607 (1971); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910). For valid and

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on his ability to convince a jury that the manner in which the confession was obtained casts doubt on its credibility"); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (judge's threatening remarks to defendant's only witness, which "effectively drove the witness off the stand," violated due process); *see also Washington v. Texas*, 388 U.S. 14 (1967) (state procedural statute barring testimony of persons charged as principals, accomplices or accessories in the same crime from testifying on one another's behalf violated the compulsory process provision of the Sixth Amendment as incorporated into the Fourteenth Amendment). They therefore did not involve the question whether, as a matter of state substantive law, certain evidence was deemed to have no exculpatory value for a particular purpose. *See Gilmore v. Taylor*, 113 S. Ct. 2112, 2118 (1993).

important reasons, Montana has excluded from consideration as an exculpatory factor a defendant's voluntary intoxication on the issue of his mental state, but not for any other purpose.[8] This process of adjusting the mental state culpability of the voluntarily intoxicated offender wholly comports with the expansive authority possessed by States to determine what constitutes criminal conduct.

The Due Process Clause accordingly does not prohibit the policy choice made in § 45-2-203. The statute instead establishes as substantive law the principle that the mens rea for all crimes, including deliberate homicide, must be determined without reference to a defendant's voluntary intoxication. Such a substantive rule is rationally related to the State's interest in preventing

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[8] In the instant case, for example, the State convinced the jury, which was instructed to convict only if it found beyond a reasonable doubt that Egelhoff took the lives of the victims knowingly or purposely, that he had done so through the events attendant to the criminal episode. *See* Mont. Code Ann. § 45-2-103(3) (1995) ("The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with offense"); *State v. Hardy*, 604 P.2d 792, 796 (Mont. 1980). This evidence included the facts that first, Egelhoff had to obtain his weapon from the glove compartment, indicating that the shooting was the product of some deliberation. Second, only two rounds were fired from Egelhoff's gun and the victims' deaths resulted from single-shot head wounds. This identical and efficient mode of the homicides' execution is not consistent with a mindless act of violence. Third, Egelhoff made a number of attempts to escape detection when approached by passersby demonstrating a plain awareness of the unlawfulness of his actions. Accordingly, there was more than substantial evidence from which the jury could find that Egelhoff committed these murders with knowledge or purpose.

crime, is firmly rooted in the history and traditions of the common law, and does not exceed any of the due process bounds enunciated by this Court. Montana's intoxication statute does not remove any argument of actual innocence from the arsenal of voluntarily intoxicated defendants or deprive them of the ability to negate even the mental state element on a basis other than their intoxication; it mandates only that such defendants may not exculpate themselves on the grounds that their intoxication prevented them from acting knowingly or purposely. In so providing, § 45-2-203 imposes the same standard of criminal liability on both the sober and the voluntarily intoxicated defendant.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

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